Bupinder Singh a/l Avatar Singh & Anor v PhileoAllied Bank (M) Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–24–290 OF 1998
KAMALANATHAN RATNAM J
14 OCTOBER 1998

Land Law *— Assignment — Land assigned to financier — No strata title issued — Attempt to auction land in order to repay loan due to financier — Absolute assignment of property — Whether assignor has unfettered right to proceed to auction property pursuant to power of attorney — Whether appropriate procedure was to commence proceedings under O 31 of Rules of the High Court 1980*

In order to finance the plaintiffs' purchase of a property ('the property'), the plaintiffs had entered into a loan agreement cum assignment with the defendant. No strata title has been issued as at this date in respect of the property. Upon the plaintiffs' failure to make the required monthly repayments, the defendant demanded the repayment of the entire loan facility. The defendant then took steps to sell the property by way of a public auction without giving any notice to the plaintiffs. The defendant applied for an injunction to prevent the defendant from selling and/or transferring by way of public auction, or otherwise from disposing of, the property. The plaintiffs contended that since the assignment of the property constituted an absolute assignment of rights of a borrower to a financier where there is no title issued, the appropriate procedure that the defendant ought to have adopted was to commence proceedings under O 31 of the Rules of the High Court 1980 ('the RHC'). Alternatively, it was submitted, if the court was to hold the assignment as not an absolute assignment, then the defendant ought to have commenced proceedings under O 83 of the RHC. The defendant on the other hand argued that it had an unfettered right to proceed to auction the property pursuant to the powers granted to it under a power of attorney.

Held, allowing the plaintiffs' application with costs:
When there is an absolute assignment of rights by a borrower to a financier and no title is issued, the appropriate procedure to be adopted by the financier to sell the property concerned would be to commence proceedings under O 31(1) of the RHC (see p 94F–H); *Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd* [1997] 2 MLJ 590 followed.

Obiter:

Even if the security documents do not create an absolute assignment, in such an event, the security documents would in any case, create an equitable charge. If that be the case, then the appropriate procedure to be adopted by the financier in this case would be to commence proceedings under O 83 of the RHC (see pp 94I and 95A).

[Bahasa Malaysia summary

Bagi membiayai pembelian hartanah oleh plaintif-plaintif ('hartanah tersebut'), plaintif-plaintif telah mengikat suatu perjanjian pinjaman merangkap penyerahhakan dengan defendan. Tiada hakmilik strata telah dikeluarkan pada tarikh ini berhubung dengan hartanah tersebut. Apabila plaintif-plaintif gagal untuk membuat bayaran semula bulanan seperti yang dikehendaki, defendan menuntut pembayaran semula keseluruhan kemudahan pinjaman. Defendan kemudiannya telah mengambil langkah untuk menjual hartanah tersebut melalui lelong awam tanpa memberikan sebarang notis kepada plaintif-plaintif. Defendan telah memohon untuk satu injunksi bagi menghalang defendan daripada menjual dan/atau memindah melalui lelong awam, atau sebaliknya daripada melupuskan, hartanah tersebut. Plaintif-plaintif berhujah bahawa oleh kerana penyerahhakan hartanah tersebut membentuk penyerahhakan mutlak hak-hak seorang peminjam kepada seorang pembiaya di mana tiada hakmilik dikeluarkan, prosedur yang wajar yang sepatutnya diterimapakai oleh defendan adalah untuk memulakan prosiding di bawah A 31 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Secara alternatif, ia dihujahkan, sekiranya mahkamah memutuskan penyerahhakan bukanlah penyerahhakan mutlak, maka defendan seharusnya memulakan tindakan di bawah A 83 KMT. Defendan sebaliknya menghujahkan bahawa ia mempunyai hak bebas untuk terus melelong harta tersebut menurut kuasa-kuasa yang diberikan kepadanya di bawah suatu surat kuasa wakil.

Diputuskan, membenarkan permohonan plaintif-plaintif dengan kos:

Di mana terdapat penyerahhakan mutlak hak-hak oleh seorang peminjam kepada pembiaya dan tiada hakmilik dikeluarkan, prosedur yang wajar diterimapakai oleh pembiaya bagi menjual hartanah berkenaan adalah untuk memulakan prosiding di bawah A 31(1) KMT (lihat ms 94F–H); *Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd* [1997] 2 MLJ 590 diikut.

Obiter:

Jika pun dokumen cagaran tidak mewujudkan penyerahhakan mutlak, sekiranya berlaku demikian, dokumen cagaran sudah tentu akan mewujudkan cagaran ekuiti. Andainya begitu, maka prosedur yang wajar untuk diterimapakai oleh pembiaya dalam kes ini adalah untuk memulakan prosiding di bawah A 83 KMT (lihat ms 94I dan 95A).]

Cases referred to

Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd [1988] 2 MLJ 62 (refd)

Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149 (refd)
Malayan Banking Bhd v Zahari bin Ahmad [1988] 2 MLJ 135 (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268 (refd)
Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd [1997] 2 MLJ 590 (folld)

Legislation referred to

Civil Law Act 1956 s 4(3)
Rules of the High Court 1980 O 31, O 83
Specific Relief Act 1950 s 41

Alex Nandaseri de Silva (*V Pury & Bala*) for the plaintiffs.
Ting Heng Peng (*Amin-Tan & Co*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The plaintiffs entered into a sale and purchase agreement on 12 November 1994 with Phileo Promenade Sdn Bhd ('the developer') for the purchase of the subject property at a price of RM449,100. To assist the plaintiffs to finance the purchase, the defendant agreed to grant a loan by way of a letter of offer dated 17 March 1995. Subsequently, a loan agreement cum assignment ('the LACA') was signed on 3 January 1996. Both the plaintiffs executed instruments of power of attorney. The first plaintiff executed the same on 31 October 1995 whereas the second plaintiff executed the same on 3 September 1995. The said instruments of power of attorney state expressly that they were given on 3 January 1996. Further, the said instruments of power of attorney state in their preamble as follows:

> WHEREAS
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> This Power of Attorney is made pursuant to a Loan Agreement cum Deed of Assignment ...

It is a fact that the monies under the loan facility granted to the plaintiffs were disbursed subsequently to the developer. The developer then by way of a letter dated 15 July 1997 notified the plaintiffs that they could obtain delivery of vacant possession of the said property.

Subsequently, the defendant through its solicitors wrote to the plaintiffs on 11 November 1997 stating that the plaintiffs had breached the said LACA by failing to make the monthly repayments amounting to RM18,563.58 as at 30 September 1997. In the circumstances, the defendant demanded the repayment of the entire loan facility granted amounting to RM376,190.37. The defendant's letter concluded with the warning that if the said sum was not paid within seven days, legal proceedings would be commenced.

By a subsequent letter dated 31 December 1997, the defendant through its solicitors gave notice that the defendant was terminating the plaintiffs' licence to occupy the said property and demanded delivery of vacant possession of the said property within seven days as the defendant intended to commence proceedings to sell the property in order to recover the debt due from the plaintiffs under the facility. A

It is a fact that the defendant did not commence any legal proceedings against the plaintiffs for the recovery of the monies due under the facility, or for the sale of the said property. B

The defendant then took steps to sell the said property by way of a public auction on 9 April 1998 at a reserve price of RM450,000. In any case, no notice of this intended public auction was served on the plaintiffs, but an advertisement to this effect was taken out in 'The Star' newspapers on 26 March 1998. C

It is also a fact that to date no strata title has been issued in respect of the said property. D

Plaintiffs' claim

The plaintiffs then filed an originating summons (encl 1) against the defendant for various declarations and an injunction to prevent the defendant whether by its agents and/or servants from selling and/or transferring by way of public auction, or otherwise from disposing of, the said property. E

Having obtained an ex parte order for the said injunction, the plaintiffs then came before me on the inter partes hearing of the said application for an injunction as prayed for, in the originating summons. F

The plaintiffs contended that since the security documents for granting the loan were the LACA and the two instruments of power of attorney, based on decided authorities, since the assignment in this case constituted an absolute assignment of rights of a borrower to a financier where there is no title issued, the appropriate procedure that the defendant ought to have adopted was to commence proceedings under O 31 of the Rules of the High Court 1980 ('the RHC'). G

Alternatively, if the court was to hold the assignment as not an absolute assignment, then the defendant ought to have commenced proceedings under O 83 of the RHC. H

Case for the defence

Whilst conceding that the security documents binding the parties are as stated by the plaintiffs, the defendant argued that it had an unfettered right to proceed to auction the land pursuant to the powers granted to it under the power of attorney. I

Findings of the court

It is obvious that the security documents for the facility granted by the defendant to the plaintiffs are the LACA and the two instruments of power of attorney.

However, I note that the LACA was signed on 3 January 1996. The power of attorney by the plaintiffs to the defendant was deemed to have been given on 3 January 1996 but the certificates of authentication of the said power of attorney are dated 31 October 1995 and 3 September 1995 respectively. However, the preamble to the power of attorney already makes reference to the LACA which at the time the certificates of authentication were issued, was not even in existence. This to my mind creates a doubt as to the validity of the two instruments of power of attorney.

The assignment

It is pertinent to ascertain what was assigned by the plaintiffs to the defendant under the LACA. The Federal Court in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 held that whether or not an agreement is an absolute assignment or by way of charge only within the meaning of s 4(3) of the Civil Law Act 1956 was to be gathered from within the four walls of the document concerned. The relevant clause relating to the assignment in the LACA is cl 8. It reads as follows:

> Assignment
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> For the consideration aforesaid, the borrower hereby absolutely assigns to the bank the full and entire of the borrower's benefits rights title and interest in and to and under the sale agreement and in the said property together with the Borrower's right of enforcement thereof or thereunder PROVIDED ALWAYS that notwithstanding the assignment hereinbefore contained or any other provision of this assignment, the borrower shall and hereby undertakes to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the borrower expressed and contained in the sale agreement.

Applying this principle, the High Court in *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62 interpreted the security documents which comprised of the loan agreement and the deed of assignment, as being security relating to a chose in action, that is to say an assignment of the defendant's rights, benefits and interest in and under the sale agreement of the property, to wit, a parcel of a sub-divided building, strata title in respect of which, was yet to be issued. The High Court held that it had jurisdiction under s 41 of the Specific Relief Act 1950; and/or that it had the inherent jurisdiction to grant the declaration prayed for and granted the plaintiff order for sale of the property. On appeal, the then Supreme Court in *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149 upheld the trial judge's decision and confirmed the finding that the deed was an absolute assignment and not purporting to be by way of

charge only within the meaning of s 4(3) of the Civil Law Act 1956 because of the use of the word 'absolutely'. The Supreme Court however did not deal with the question as to whether the assignment therein was an absolute assignment creating a security relating to a chose in action, or a security relating to land as contemplated by the trial judge. The saga of *Hipparion* did not end with the decision of the Supreme Court. The Supreme Court held that the deed of assignment of the subject property was absolute in nature and not by way of charge only, the proceeds from the sale of the subject property were insufficient to meet Hipparion's liability to Chung Khiaw Bank in full. The bank therefore sued the guarantor upon the guarantee. That was the case of *Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd* [1997] 2 MLJ 590. The Court of Appeal held that the findings by the courts at all levels in the *Hipparion* proceedings that the deed of assignment was absolute and not by way of charge was made only in the context of the procedure adopted by the bank to effect a sale of the subject property. The Court of Appeal went on to hold that the decision of the Supreme Court in the *Hipparion* proceedings did not hold that the debt owed by Hipparion had been extinguished by the absolute assignment it gave the bank. In fact, the Court of Appeal held at p 595:

> When Hipparion failed to meet its obligations under the loan agreement, the respondent had to take such steps as were necessary to recover the principal and interest. The procedure prescribed by O 83 of the Rules of the High Court 1980 ('the RHC') did not apply to the fact pattern because there was neither a registered nor an equitable charge. The appropriate procedure was that made available by O 31 of the RHC. And that is the procedure that was resorted to by the respondent and sanctioned by the Supreme Court.

Much as it is not my duty at this stage to make any positive findings, I am constrained, in the light of clear and manifest authorities of both the superior courts, to hold that when there is an absolute assignment of rights by a borrower to a financier, where there is no title issued, the appropriate procedure to be adopted by the financier to sell the property concerned would be to commence proceedings under O 31(1) of the RHC, which reads:

> Power to order sale of immovable property
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> Where in any cause or matter relating to any immovable property it appears necessary or expedient for the purposes of the cause or matter that the property or any part thereof should be sold, the Court may order that property or part to be sold, and any party bound by the order and in possession of that property or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct.

Assignment by way of a charge

Even if I were to hold that the security documents do not create an absolute assignment which I hasten to add, I do not so find, it is my judgment that in such an event, the security documents would in any case, create an equitable charge. If that be the case, then the appropriate procedure to be

A adopted by the financier in this case would be to commence proceedings under O 83 of the RHC (see *Malayan Banking Bhd v Zahari bin Ahmad* [1988] 2 MLJ 135).

In the circumstances I grant an order in terms of prayers (3), (6), (7) and (8) of the plaintiffs' application with costs.

B *Application allowed with costs.*

Reported by Loo Lai Mee

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